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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM PETER BLATTY,

Petitioner,

vs.

NEW YORK TIMES COMPANY, and DOES 1 through 10, inclusive,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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Vol. II of II

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NO. WEC 082071

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILLIAM PETER BLATTY

Plaintiff

vs.

NEW YORKS TIMES COMPANY,

DOES 1 through 10, inclusive,

Defendants.

FIRST AMENDED COMPLAINT FOR DAMAGES

1. & 2. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE;

3. UNFAIR COMPETITION IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17200 - 17208;

4. FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17500-17520;

5. BREACH OF PUBLIC DUTY AND TRUST TO REPORT THE NEWS FAIRLY AND HONESTLY WITHOUT BIAS OR PREJUDICE.

GENERAL ALLEGATIONS

1. Plaintiff WILLIAM PETER BLATTY ("Blatty") is and, at all times mentioned herein, was an individual residing in the County of Los Angeles, State of California. Blatty is an author of a number of works of fiction, including "The Exorcist" and a recent novel entitled "Legion". Blatty owns valuable rights in and to "Legion" and to revenues from the sale of each copy of "Legion".

2. Defendant NEW YORK TIMES COMPANY is and, at all times mentioned herein, was a corporation duly organized and existing under the laws of the State of New York and owns, publishes and distributes a newspaper known as the New York Times, which is distributed by the New York Times Company and sold through the mails and through local news vendors to persons residing in the County of Los Angeles, State of

California.

3. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, associate or otherwise, of Defendants sued herein as Does 1 through 10, inclusive, and, therefore, sues these Defendants by such fictitious names. Plaintiff will amend the Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and, based thereon, alleges that each of the fictitiously named Defendants is responsible in some manner for the occurences herein alleged and that Plaintiff's damages as herein alleged were proximately caused by their conduct.

4. Plaintiff is informed and believes and, based thereon, alleges that at all times herein relevant, Defendants, and each of them were the agents, servants and employees of each other, and were, at all

times herein relevant, acting in the course and scope of said agency, service and employment.

5. During 1983, Defendants published a list in the New York Times entitled "Best Sellers" (the "List") purporting to rank best selling books, fiction and non-fiction, based on actual sales. The List was published and purportedly updated weekly in the New York Times.

6. Although the List purports, and purported, to rank books on the basis of sales and not on the basis of the literary merits of a particular work, the List has and had a substantial influence on the purchase and promotion of the books by booksellers and on the purchase of the books by the general public. Many persons purchase current novels and many book-sellers promote current novels, primarily or substantially because such novels are

included on the List. Many bookstores discount books appearing on the List and display the books in their stores more prominently than books not on the List. Thus, books included on the List sell substantially more copies than unlisted books due in substantial part to their inclusion on the List. Such sales enhance the sale of later paperback editions of such books and of movie rights to such books. Defendants knew that the List had and has such influence.

7. Because of the foregoing, authors whose books appear on the List have a significant and valuable prospective business advantage with respect to promoting and maximizing sales of such books and of later paperback editions of such books and of movie rights to such books (the "Prospective Advantage").

8. At all times relevant hereto,

Defendants expressly and impliedly advertised and represented to authors, booksellers and the general public that the List was an objective, unbiased and accurate compilation of actual sales of books each week by 2000 bookstores in every region of the United States. At the time it made such representations, Defendants knew them to be untrue. Since the instant suit was filed, Defendants have changed the express representation to reflect that the List is "statistically adjusted to represent sales in all bookstores".

9. Defendants merchandise the List for their own benefit. The aforesaid influence the List has on the purchase and promotion of books and of the paperback editions and on the exploitation of movie rights enhances the Defendants' ability to sell advertising to publishers and major chain bookstores.

Defendants sell separate subscriptions to the New York Times Book Review (the "Book Review") which contains the List. Defendants promote a telephone number which may be called to obtain the names of the books on the List. Defendants syndicate and sell the List as a service to persons and publications throughout the world.

10. At all times relevant herein, Defendants knew the List was not an objective, unbiased or accurate reporting of actual sales as represented because, at all times relevant herein, inter alia:

(a) Defendants did not use actual sales in compiling the List but rather used an undisclosed method of "weighting" certain sales more than others;

(b) To obtain sales figures from bookstores, Defendants sent to the bookstores forms (the "Forms") which

Defendants prepared; the Forms for works of fiction contain and contained a printed list of 36 "bestselling" books which has and had the effect of encouraging reports as to sales of books listed on the Forms and discouraging reports as to sales of books not listed on the Forms;

(c) Although the List purports to be updated weekly, Defendants mailed out four weeks of Forms at a time so that the printed list on the Forms was changed only monthly, not weekly;

(d) Defendants mailed, in the same envelope with the Forms, printed matter promoting books listed on the Forms, knowing and intending that such promotion would affect the reports from the book-stores and give books so promoted an unfair advantage over those not mentioned in the material sent by Defendants;

(e) Defendants made no effort

to investigate, check or review the sales figures supplied by the bookstores to confirm the accuracy of sales which were reported on the Forms and, lacking any such controls, had no method of determining whether the sales figures were accurately reported.

11. Blatty authored, and Simon and Schuster, Inc. published in 1983, a work of fiction entitled "Legion" which sold more than sufficient copies in the relevant time periods to warrant inclusion on the List for many weeks during the summer of 1983 and otherwise met all criteria for such inclusion during said time. During said time period, "Legion" appeared on the best sellers lists of other well-known publications, including Publishers Weekly, Time Magazine, the Chicago Tribune and the Los Angeles Times.

12. Though available for sale in bookstores in June and July 1983, and, in fact, selling in "Best Seller" quantity during June and July, "Legion" did not appear on Defendants' Forms sent to bookstores for reporting purposes for those months.

13. Acting on Blatty's behalf, Simon and Schuster, Inc., in or about July and August, 1983, contacted management employees of Defendants and provided information that "Legion" had sold more than sufficient copies to warrant inclusion on the List, and, in fact, had sold more copies than another book published by Simon and Schuster, Inc., which was on the List. Simon and Schuster, Inc. also told Defendants it had the sales figures which would substantiate that "Legion" qualified for the List. Defendants recklessly and/or intentionally failed and

refused to review Simon and Schuster, Inc.'s figures.

14. Defendants did list the novel "Legion" on their August Forms but misspelled the title and sent the August Forms to the booksellers with printed matter promoting books other than "Legion".

15. Despite the information provided by Simon and Schuster, Inc. management employees of Defendants, acting in the course and scope of their employment and knowing that the List had and has substantial influence on booksellers and the general public and that Blatty would be deprived of the Prospective Advantage, intentionally or recklessly and without cause refused to include "Legion" on the List for many weeks thereafter. In or about September 1983, Defendants included "Legion" on the List for one week only and then in the last position on the List.

Prior and subsequent to that publication, Defendants intentionally or recklessly and without cause excluded "Legion" from the List, while continuing expressly and impliedly to represent the List to be an objective, unbiased and accurate compilation of actual sales.

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE

16. Blatty hereby incorporates by reference paragraphs 1 through 15 above.

17. As a direct and proximate result of Defendants' actions, Blatty was deprived of the aforesaid Prospective Advantage he otherwise would have obtained.

18. As a further direct and proximate result of Defendants' actions, Blatty has sustained, and will continue to sustain, damages due to lost sales and higher promotional expenses for "Legion", lost value

in the paperback editions and lost value in movie rights, all in excess of $3,000,000.

19. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List for many weeks for which it qualified. Therefore, in addition to actual damages, Blatty seeks exemplary and punitive damages in an amount sufficient to make an example of and punish the Defendants but not less than $5,000,000.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE

20. Blatty hereby incorporates by reference paragraphs 1 through 15 above and 17 through 19 above except for those allegations relating to Defendants' publication of the List in the New York Times news-

paper or in the Book Review. Defendants' conduct in that regard is expressly excluded from this Cause of Action.

21. Defendants republished the List separate and apart from its publication in the New York Times or The Book Review. Defendants promoted, sold, syndicated and licensed the List, and reproductions of the List, in California and throughout the world. Defendants furnished or licensed to bookstores and to booksellers "blow-ups" of the List for public display. Defendants sold or licensed the List, or reproductions of the List, as a service to vendors and other persons in California and throughout the world.

22. In all of these activities, during June, July, August and September, 1983, Defendants excluded "Legion" from the List for many weeks for which it qualified to be included. Defendants only included "Legion"

on the List for one week when, in fact, it qualified to be included on the List for many other weeks during that period. Defendants knowingly and falsely represented to booksellers and to potential purchasers of "Legion" that the book was not a Best Seller for those periods when in fact it was.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR UNFAIR COMPETITION IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17200 - 17208

23. Blatty hereby incorporates by reference paragraphs 1 through 15 and 21 and 22 above.

24. The aforesaid representations by Defendants concerning the List constituted unlawful, unfair and fraudulent business practices and unfair, deceptive, untrue and misleading advertising which deceived consumers as to the popularity of books available for sale, all in violation of

California Business and Professions Code Sections 17200 et seq.

25. As a direct result thereof, many booksellers and consumers who otherwise would have purchased "Legion" did not do so and purchased other books in competition with "Legion" and, due to the false representations concerning the accuracy of the List, many persons and publications which otherwise would not have done so purchased the List, The Book Review and The New York Times newspaper and advertisements therein. Many booksellers and consumers were misled and deceived by the omission of "Legion" from the List for all but one week during the period June through September, 1983 and influenced by, and relying upon the List, were not interested in, and did not purchase or promote "Legion".

26. As a further and direct and proximate result of the New York Times Company's

actions, Blatty sustained damages of more than $3,000,000 due to lost sales for "Legion" and in lost value for the paperback edition and the movie rights.

27. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List on weeks where it otherwise qualified. Defendants acted maliciously and in conscious disregard of the rights of booksellers, consumers and the general public and with the intent and purpose of depriving them of their rights and property by refusing to reveal that the List was not an objective, unbiased and accurate reporting of actual sales as Defendants had represented. Therefore, in addition to actual damages, exemplary and punitive damages are sought in an amount sufficient

to make an example of and punish the Defendants but not less than $5,000,000.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17500 - 17572

28. Blatty hereby incorporates paragraphs 1 through 15, 21, 22 and 25 above.

29. Defendants made, disseminated, and caused to be made and disseminated, the aforesaid representations concerning the List before the public in California in its newspaper and in other publications circulated in California and elsewhere. At all times, Defendants knew that said representations were untrue and misleading and would mislead the public as to the accuracy of the List and as to the identity of best selling books and would affect the sales of "Legion" and other books selling in competition to "Legion as well as sales

of the List, The Book Review and the New York Times newspaper.

30. Defendants' aforesaid representations constituted false and misleading statements in violation of California Business and Professions Code Section 17500 et seq.

31. As a direct result of Defendants' aforesaid conduct, many booksellers and consumers who otherwise would have purchased or promoted "Legion" did not do so and purchased and promoted other books selling in competition with "Legion", and, due to the false representations concerning the accuracy of the List, many publications and persons purchased the List, Book Review and the New York Times newspaper and advertisements therein who otherwise would not have done so.

32. As a further and direct and proximate result of the Company's actions,

Blatty sustained damages of more than $3,000,000 due to lost sales for "Legion" and to lost value for the paperback edition and the movie rights.

33. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List on weeks when it otherwise qualified. Defendants acted maliciously and in conscious disregard of the rights of book-sellers, consumers and the general public and with the intent and purpose of depriving them of their rights and property by refusing to reveal that the List was not an objective, unbiased and accurate reporting of actual sales as Defendants had represented. Therefore, in addition to actual damages, exemplary and punitive damages are sought in an amount

sufficient to make an example of and punish the Defendants but not less than $5,000,000.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR BREACH OF PUBLIC DUTY AND TRUST TO REPORT THE NEWS FAIRLY AND HONESTLY WITHOUT BIAS OR PREJUDICE

34. Blatty hereby incorporates by reference paragraphs 1 through 15, 21, 22, 25, 29 and 31 above.

35. At all times mentioned herein, Defendants had a public duty or trust to sell or distribute newspapers to the public containing a fair and honest report of all news without bias or prejudice.

36. Defendants' aforesaid conduct and representations concerning the List constituted a breach of said duty or trust.

37. As a direct and proximate result thereof, many persons and booksellers who otherwise would have purchased or promoted "Legion" did not do so and purchased or promoted other books instead, and due to

the false representations concerning the accuracy of the List, many persons and publications which otherwise would not have done so purchased the List, The Book Review and the New York Times newspaper.

38. As a further direct and proximate result of the Defendants' actions, Blatty sustained damages of more than $3,000,000 in lost sales for "Legion" and in lost value of paperback and movie rights.

39. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List on weeks when it otherwise qualified. Defendants acted maliciously and in conscious disregard of the rights of booksellers, consumers and the general public and with the intent and purpose

of depriving them of their rights and property by refusing to reveal that the List was not an objective, unbiased and accurate reporting on actual sales as Defendants had represented. Therefore, in addition to actual damages, exemplary and punitive damages are sought in an amount sufficient to make an example of and punish the Defendants but not less than $5,000,000.

WHEREFORE, Plaintiff William Peter Blatty prays for judgment against defendants as follows:

As to each cause of action:

1. For actual damages in excess of $3,000,000;

2. For exemplary and punitive damages in an amount not less than $5,000,000;

3. For costs of suit;

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4. For such other and further relief as the Court may deem proper.

Dated: April 23, 1984.

COLEMAN & FARRELL
A Professional Corporation

By /s/
RICHARD M. COLEMAN
Attorneys for Plaintiff
WILLIAM PETER BLATTY

Court of Appeal-Second District
FILED - Dec. 12, 1985
Clay Robbins, Jr. Clerk

Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE

OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WILLIAM PETER BLATTY, Plaintiff and Appellant, v. NEW YORK TIMES COMPANY, Defendant and Respondent.	Nos. B008737 and B0010053 (Superior Court No. WEC 82071)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County. Laurence J. Rittenband, Judge. Judgment affirmed in part and reversed in part with

directions; appeal from order dismissed.

Coleman & Farrell and Richard M. Coleman for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, Richard P. Levy, Gail E. Lees and William C. Foutz, and David A. Thurm, for Defendant and Respondent.

William Blatty sued the New York Times Company for damages on several theories, all of which were based on defendant's failure to include in its best seller list a book written by plaintiff. The trial court sustained defendant's general demurrer to the first amended complaint without leave to amend. Plaintiff appeals from the ensuing judgment of dismissal. (No. B008737.) He also appeals from order denying his motion

to tax costs made after judgment.[1] (No. B010053. Pursuant to plaintiff's motion we ordered that the appeals be consolidated.

FACTS

I

ORIGINAL COMPLAINT AND PROCEEDINGS THEREON

The original complaint contained four causes of action. The first cause of action (negligent interference with prospective business advantage) included the following allegations: Defendant owns, publishes and distributes the newspaper New York Times and publishes weekly therein a list entitled "Best Sellers" purporting to rank best selling books, fiction and nonfiction, based on actual

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[1] The order is appealable. (Code Civ. Proc., § 904.1, subd. (b); Lacey v. Bertone (1949) 33 Cal.2d 649, 654; Jimenez v. City of Oxnard (1982) 134 Cal. App.3d 856, 858, fn. 3.)

sales. Authors whose works appear on the list have a significant and valuable prospective business advantange in promoting and maximizing the sales of such books in both hardback and paperback editions, and the sale of movie rights to such books. Although the list purports to rank books on the basis of sales and expresses no opinion on their merits, the reputation of the New York Times and its perceived expertise in literary matters are such that many book sellers promote, and many persons purchase, current works of fiction primarily because they are included in the list. Defendant knew or should have known that the list has such influence on the sale and promotion of books. Plaintiff authored, and Simon and Schuster published, a new work of fiction entitled "Legion" which sold more than sufficient copies to warrant inclusion in the list and otherwise

met all criteria for such inclusion. Defendant negligently failed to include "Legion" in the list, thereby depriving plaintiff of the prospective advantage which he otherwise would have obtained.

The second cause of action (intentional interference with prospective business advantage) alleged: Acting on plaintiff's behalf, Simon and Schuster provided defendant's management employees with information that "Legion" had sold more than sufficient copies to warrant inclusion in the list, and requested that "Legion" be included; despite such information defendant, intentionally or recklessly and without cause, refused to include "Legion" in the list; as a result plaintiff suffered damage by loss of the advantage he otherwise would have obtained.

The remaining causes of action (negligence and trade libel) incorporated most

of the foregoing allegations of the first and second causes of action.

Less than two months after filing the complaint plaintiff noticed the taking of depositions and the production of documents. Thereafter, defendant filed a general demurrer to the complaint. Plaintiff moved for an order compelling the taking of the depositions and the production of documents previously noticed, asserting his right to discovery despite the pendency of the demurrer. In support of the motion plaintiff submitted his declaration which incorporated by reference an attached newspaper article presumably intended to show the relevancy of the proposed discovery. The newspaper article caused the trial court to question the allegation that defendant refused to include "Legion" in the best seller list despite the information furnished to it

by Simon and Schuster. The court stated that it could not rule on the demurrer until it was sure that such allegation was supported by admissible evidence. Accordingly, on the court's insistence and over plaintiff's objection, the parties took depositions of an employee of Simon and Schuster and an employee of defendant limited to the issue of the nature of information about sales of "Legion" allegedly supplied by Simon and Schuster to defendant.

The court took judicial notice of the depositions and concluded they contained no evidence that Simon and Schuster supplied defendant with any figures of sales of "Legion". The demurrer to the second cause of action was sustained with leave to amend to allege facts showing that (1) defendant "violated its public duty or trust to sell or distribute its newspaper

to the public containing a fair and honest report of all news without bias or prejudice"; and (2) defendant had in its possession reports of the actual sales of "Legion" which would qualify the book for inclusion in the best seller list and nevertheless deliberately refused to list it.[2] The demurrer to the remaining causes of action was sustained without leave to amend on the ground that defendant had no duty to include a book in the list except as indicated above, and those causes of action did not allege facts showing such

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[2] The court clarified its ruling as follows: ". . .2. As to the second cause of action, if the new facts to be alleged also are sufficient to support other causes of action, the complaint may so allege. [¶] 3. The court is limiting the plaintiff to a cause of action for an intentional omission of Legion from the 'Best Seller List' by the New York Times despite its knowledge that the sales of the book to the public qualified it for inclusion on the list." (Original emphasis.

a duty.

II

FIRST AMENDED COMPLAINT
AND PROCEEDINGS THEREON

In the amended complaint plaintiff again attempted to state a cause of action for intentional interference with prospective advantage, and set forth three additional theories of liability.

The first and second cause of action (both labeled intentional interference with prospective advantage) repeated in essence the allegations of the original complaint regarding defendant's publication of the best seller list and the prospective advantage accruing to authors whose books appear on the list. They further alleged: Defendant expressly and impliedly advertised and represented to authors, book sellers and the general public that the list was an objective, unbiased and

accurate compilation of actual sales of books each week by 2,000 book stores in every region of the United States. Defendant knew such representation was false because, among other things, defendant did not use actual sales in compiling the list but rather used an undisclosed method of "weighting" certain sales more than others. In July or August 1983 Simon and Schuster, acting on plaintiff's behalf, contacted management employees of defendant and told them it had sales figures showing that "Legion" qualified for the list. Defendant intentionally, or recklessly and without cause, refused to review such figures and to include "Legion" in the list for many weeks thereafter. In September 1983 defendant included "Legion" in the list for one week only, and then in last position. As a result of defendant's acts

plaintiff was deprived of the prospective advantage which he otherwise would have obtained; he thereby sustained damages in excess of $3 million through lost sales of and higher promotional expenses for "Legion", lost value in paperback editions and lost value in movie rights. Defendant acted maliciously and with intent to deprive plaintiff of his rights and property by refusing to include "Legion" in the list for many weeks during which it qualified for inclusion. Accordingly, plaintiff is entitled to punitive damages of not less than $3 million.[3]

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[3] The second cause of action differs from the first only by the addition of allegations that defendant republished the best seller list separate and apart from its publication in the New York Times and the New York Times Book Review, and promoted, sold, syndicated and licensed the list throughout the world as a service to vendors and other persons; defendant also furnished to book stores and book sellers "blow-ups" of the list for public display.

Each of the subsequent causes of action incorporated most of the foregoing allegations. The third and fourth causes of action (unfair competition, and false and misleading advertising, respectively) alleged that defendant's representations concerning the list constituted fraudulent business practices, false and misleading statements, and untrue and misleading advertising which deceived consumers as to the popularity of books available for sale, all in violation of Business and Professions Code section 17200 et seq. and section 17500 et seq. As a result many book sellers and consumers who otherwise would have purchased "Legion" did not

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Cont. of fn. 3:

Plaintiff states that the purpose of such allegations is to focus on defendant's commercial activities in advertising and marketing the list.

do so and instead purchased other books in competition with "Legion". Plaintiff thereby sustained damages in excess of $3 million. The fifth cause of action, apparently based on the court's comments in sustaining the demurrer to the complaint, alleged that defendant had a public duty or trust to sell and distribute newspapers containing a fair and honest report of all news without bias or prejudice; defendant's conduct and representations concerning the list constituted a breach of such duty which caused plaintiff to sustain damages of more than $3 million.

Defendant demurred generally to the amended complaint on grounds that each cause of action is barred by the First Amendment to the United States Constitution and Article I, Section 2 of the California Constitution, and the facts pleaded do not state a cause of action

on any of the theories set forth. The demurrer was sustained without leave to amend on the grounds stated. Judgment was entered dismissing the action.

DISCUSSION

I

APPEAL FROM JUDGMENT OF DISMISSAL

Plaintiff contends the original complaint as well as the amended complaint stated valid causes of action. While an appellate court ordinarily will not consider the allegations of a superseded complaint (see Foreman & Clerk Corp. v. Fallon (1971) 3 Cal.3d 875, 884), that rule is inapplicable where the trial court denied plaintiff leave to include those allegations in an amended complaint. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 209.) The trial court here sustained

the demurrer to the complaint without leave to amend as to all causes of action except intentional interference with prospective business advantage, limiting an amended complaint to that cause of action and any other that could be stated consistent with the court's ruling. Accordingly, the allegations of the complaint are reviewable insofar as they attempted to state causes of action for negligent interference with prospective business advantage, negligence and trade libel.

A legal duty to use due care is a necessary element of a negligence action. (Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal.3d 49, 54, fn. 3.) The determination of duty is primarily a question of law; it is the court's "'expression of the sum total of those considerations of policy which lead the law to say that

the particular plaintiff is entitled to protection.' [Citation.]" (Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40, 46.) In J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 804, the Supreme Court set forth six criteria for determining whether a duty of care is owed: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. In connection with the last factor, countervailing public policies which may preclude recovery must also be considered. (Id., at p. 804, fn. 1.)

Assuming a sufficiently close connection between defendant's conduct and plaintiff's injury and that the harm to plaintiff was foreseeable, the other factors compel the conclusion that defendant owed no duty to plaintiff to include his book in its best seller list. The complaint did not specifically allege that the omission of the book from the list was intended to affect plaintiff, and no facts are alleged which show such an intent on defendant's part. Further, no facts are pleaded from which it may be inferred that defendant's conduct was morally blameworthy. The complaint alleges that defendant failed to include plaintiff's book in its best seller list despite knowledge that it "sold more than sufficient copies to warrant inclusion and otherwise met all criteria for inclusion." The complaint fails to

allege how it was determined that enough copies of the book were sold to warrant its inclusion, or what other criteria were met and by whom they were established. For all that appears defendant, for reasons of its own and employing criteria different from those which plaintiff considered to be conclusive, deemed the book unqualified for inclusion in the list. Public policy factos also weigh against imposition of such a duty. The list is a means of informing the public of the relative popularity of current works of fiction and nonfiction. If defendant were held to owe a duty to plaintiff to include his book in its list, other authors could assert a like duty owed to them. Faced with such a situation defendant might well cease compilation and publication of the list, thereby depriving the public of a

valuable service. For all of these reasons we conclude as a matter of law that defendant owed plaintiff no duty to include his book in its best seller list. It follows that the complaint does not state causes of action for either negligent interference with prospective advantage or negligence.

Trade libel is defined as "an intentional disparagement of the qualiry of property, which results in pecuniary damage to plaintiff." (Erlich v. Etner (1964) 224 Cal.App.2d 69, 73.) "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (Shores v. Chip Steak Co. (1955) 130 Cal. App.2d 627, 630.) The complaint fails to state a cause of action for trade libel. Such libel allegedly consisted

of defendant's intentional and false omission of "Legion" from its best seller list. Silence is not libel. (Pond v. General Electric Co. (9th Cir. 1958) 256 F.2d 824, 827, cert. den., 358 U.S. 818 [3 L.Ed.3d 60, 79 S.Ct. 30].) "[T]he law does not recognize libel by omission as a tort. Libel, by definition, consists of the publication of a false and unprivileged fact. Thus, liability may be imposed in a libel case only for an assertion or implication of fact that is false and unprivileged, and not for mere omission of a relevant fact." (Janklow v. Newsweek, Inc. (8th Cir. 1985) 759 F.2d 644, 648; fn. omitted.) Of particular significance in the present case is the Janklow court's further conclusion that refusal to impose liability for omission of facts "has strong under-

pinnings in the First Amendment." (759 F.2d at p. 648.) Said the court: "In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Supreme Court struck down a state law that made punishable as a misdemeanor a newspaper's failure to print the reply of a political candidate to a column by that newspaper attacking the candidate's official record. . . . While newspapers have long been liable for that which they publish, they have never been liable solely for that which was omitted. [Citation.] We see no constitutionally significant distinction between the law struck down in Miami Herald, which made it a misdemeanor not to publish a specific item, and a cause of action that would permit a plaintiff to recover damages based on mere failure to publish a specific item." (Janklow v.

Newsweek, Inc., supra, 759 F.2d at p. 648.)

Plaintiff contends the trial court erred in ordering depositions for the purpose of ruling on the demurrer to the complaint and in taking judicial notice of the depositions in sustaining the demurrer (see De Cruz v. County of Los Angeles (Oct. 31, 1985. B009265) ____ Cal.App.3d _____). He also complains of the court's refusal to allow him to conduct discovery for that purpose beyond the limited scope ordered by the court. It is unnecessary to consider the merits of these contentions inasmuch as the action of the court in sustaining the demurrer was correct. "'. . . No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because

given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19.)

We turn now to the amended complaint. Defendant argues no cause of action is stated under the unfair competition and false advertising laws (Bus. & Prof. Code, § 17200 et seq., § 17500 et seq.) because the remedy for violation of such laws does not include damages for private individuals, but is limited to injunctive relief (Id., §§ 17203, 17535) and imposition of civil penalties (Id., §§ 17206, 17207, 17535.5, 17536). In United Farm Workers of America v. Superior Court (1975) 47 Cal.App.3d 334, 343-345, it was held that damages are recoverable by an individual

plaintiff for violation of the unfair competition law. The court there reasoned: "[T]he breach of a duty imposed by statute gives rise to a cause of action for damages if damages can be shown. The fact that the statutes sound in equity and by their terms do not specify that damages may be awarded does not bar the recovery of damages in a proper case even though the action be one in equity rather than law." (United Farm Workers, supra, 47 Cal.App.3d at p. 344.) However, in Chern v. Bank of America (1976) 15 Cal.3d 866, the Supreme Court stated: "Plaintiff's cause of action to recover damages for false or misleading statements (Bus. & Prof. Code, § 17500) was likewise properly dismissed. The applicable statutes do not authorize recovery of damages by private individuals. Private relief is limited to filing of actions for an injunction (Id., § 17535);

and civil penalties are recoverable only by specificed public officers (Id., §§ 17535.5, 17536.)" (P. 875; original emphasis.)

Both parties rely on Committee on Children's Television, Inc. v. General Foods Corp., supra, 35 Cal.3d 197, in support of their respective positions on the issue whether a plaintiff other than a business competitor can recover damages on a cause of action based on the unfair competition or false advertising law. Such reliance is misplaced, for the Supreme Court in that case deemed it unnecessary to reach the issue and thus did not resolve the conflict between United Farm Workers and Chern; the court merely referred to both cases for a discussion of the damage issue. (35 Cal.3d at p. 215, fn. 16.) Inasmuch as Chern is a

decision of the Supreme Court, we are bound to follow it. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) We therefore conclude that the amended complaint does not state causes of action for damages sustained by plaintiff as a private individual based on defendant's alleged violation of the unfair competition and false advertising laws.

As previously noted, it appears that the cause of action labeled "breach of public duty and trust to report the news fairly and honestly without bias or prejudice" was included in the amended complaint in response to the trial court's comments in sustaining the demurrer to the complaint. That the First Amendment prohibits imposition of such a duty is made clear by the United States Supreme Court. "For better or worse, editing is

what editors are for; and editing is selection and choice of material. That editors -- newspaper or broadcast -- can and do abuse this power is beyond doubt. . . . Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility -- and civility -- on the part of those who exercise the guaranteed freedoms of expression." (Columbia Broadcasting v. Democratic Comm. (1973) 412 U.S. 94, 124-125 [36 L.Ed.3d 772, 796, 93 S.Ct. 2080].) The principle was stated even more forcefully in Miami Herald Publishing Co. v. Tornillo (1974) 418 U.S. 241, 258

[41 L.Ed.2d 730, 741, 94 S.Ct. 2831].):
"The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (Emphasis added.)

The elements of a cause of action for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge

by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption thereof; and (5) damages to plaintiff proximately caused by the act of the defendant. (Buckaloo v. Johnson (1975) 14 Cal.3d 815, 827; Smith v. Superior Court (1984) 151 Cal.App.3d 491, 501; Asia Investment Co. v. Borowski (1982) 133 Cal.App.3d 832, 840-841.) The amended complaint sets forth each of these elements. It alleges that plaintiff, as author of the novel "Legion" own valuable rights in the book and in revenues from its sale. Many persons purchase current novels, and many book sellers promote current novels, primarily because such novels are included in defendant's best seller list; many book stores discount books appearing in the

list and display such books more prominently than those not on the list. Thus, books included in the list sell substantially more copies than those not appearing therein. Defendant knew the list had and has such influence. Because of this influence, authors whose books appear on the list have a "significant and valuable prospective business advantage" in promoting and maximizing sales of their books. Defendant expressly and impliedly represented to authors, book sellers and the general public that the list was an objective, unbiased and accurate compilation of actual sales of books each week by 2,000 book stores in every region of the United States. At the time it made such representations defendant knew they were untrue. With knowledge that the list had substantial influence on book sellers

and the general public and that plaintiff would be deprived of the prospective advantage by omission of his book from the list, defendant "intentionally or recklessly and without cause" refused to include the book in the list. Defendant acted with the intent and purpose of depriving plaintiff of his rights and property. As a direct and proximate result of defendant's acts, plaintiff suffered damages.

Defendant argues that the foregoing allegations do not include the first and second elements of a cause of action for intentional interference with prospective economic advantage because there is no showing that plaintiff had an existing economic relationship with any specific third person. but only a showing of possible future relationship with potential purchasers of his book; the

allegation that defendant knew of the list's influence on such purchasers is not tantamount to an allegation that defendant knew of an existing relationship subject to intentional interference. The contention lacks merit. The tort of interference with prospective advantage lies for interference with relations which are merely prospective or potential. (See Buckaloo v. Johnson, supra, 14 Cal. 3d 815, 822; Gold v. Los Angeles Democratic League (1975) 49 Cal.App.3d 365, 375.) Liberally construed with a view to substantive justice between the parties (See Postley v. Harvey (1984) 153 Cal. App.3d 280, 287), the amended complaint alleges the requisite relationship and defendant's knowledge of the existence of that relationship.

Defendant also contends the cause of action for intentional interference

with prospective advantage is fatally defective because defendant owed plaintiff no duty to protect his economic interest. In support of this contention defendant cites Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc. (1983) 142 Cal. App.3d 589. That case is not in point inasmuch as it involved an action for negligent interference with prospective economic advantage.

Defendant further argues that inasmuch as the list was compiled in the exercise of its editorial judgment and represented its opinion of which books were best sellers, the First Amendment shields defendant from liability for interference with plaintiff's prospective advantage by refusing to include his book in the list. (See Miami Herald Publishing Co. v. Tornillo, supra, 481

U.S. 241, 258 [41 L.Ed.2d 730, 741, 94 S.Ct. 2831]; Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 339-340 [41 L.Ed. 2d 789, 805, 94 S.Ct. 2297].) This contention ignores the amended complaint's allegation that defendant falsely represented, with knowledge of falsity, that the list was an accurate and objective compilation of actual sales of books each week in 2,000 book stores throughout the United States. The list thus was not held out as the product of defendant's editorial jdgment or an expression of its opinion but was falsely represented to be in fact a compilation of best sellers based on objective criteria. Under these circumstances the First Amendment does not foreclose plaintiff's cause of action. "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error

materially advances society's interest in 'uninhibited, robust, wide-open' debate on public issues. [Citation.] They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' [Citation.]" (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 340 [41 L.Ed.2d at p. 805].)

We conclude that the judgment of dismissal must be reversed as to the causes of action for intentional interference with prospective economic advantage.

II

APPEAL FROM ORDER DENYING MOTION TO TAX COSTS

Inasmuch as the award of costs to

defendant was incident to the judgment, partial reversal of the judgment operates to vacate the award. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 625, p. 607.) Accordingly, plaintiff's appeal from order denying his motion to tax costs, is moot, and the appeal therefrom is dismissed.

DISPOSITION

The judgment of dismissal is reversed as to the first and second causes of actions which directions to the trial court to overrule the demurrer to those causes of action and allow defendant a reasonable time within which to file an answer thereto; in all other respects the judgment is affirmed. Plaintiff's appeal from order denying his motion to tax costs is dismissed. Neither party shall recover costs on appeal.

CERTIFIED FOR PUBLICATION.

LILLIE, P.J.

We concur:

THOMPSON, J.

JOHNSON, J.

C O P Y

Supreme Court
F I L E D
Dec. 29, 1986
Laurence P. Gill, Clerk

L.A. 32173
Ct. App. 2/7 B 008737
and B 010053

Super. Ct. No.
WEC 82071

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

WILLIAM PETER BLATTY,

Plaintiff and Appellant,

v.

NEW YORK TIMES COMPANY, et al.,

Defendants and Respondents.

The fundamental question in this case is whether a newspaper can be held liable for failing to include a book in its list

SEE CONCURRING AND DISSENTING OPINION

of "best sellers". As we shall explain, we conclude that the answer is no.

I

Plaintiff William Peter Blatty brought this action for damages against defendant New York Times Company, publisher of the New York Times. Four causes of action are asserted in the original complaint: negligent interference with prospective economic advantage, negligence, and trade libel.

The allegations underlying each of these causes of action may be summarized as follows: Blatty is the author of a number of works of fiction including The Exorcist and a recently published hardback novel entitled Legion; the Times publishes a weekly list "purporting to rank best selling books . . . based on actual sales"; because many new books are published each year, authors whose hardback books appear

on this list benefit by greater sales of the books themselves and an increased value of paperback and film rights; although the list purports to rank books on the basis of sales and expresses no opinion on thier merits, because of the reputation of the Times and its perceived expertise in literary matters the list has a substantial positive influence on the ordering and promotion of books by booksellers and on the purchase of books by consumers; the Times knew or should have known of this influence; Legion, authored by Blatty and published by Simon & Schuster, sold more than enough copies, and met all other criteria, to merit inclusion on the list; the Times, however, failed to include Legion; as a result, Blatty suffered injury by loss of the benefits that inclusion would have brought. With respect to the intentional-interference claim it is also

alleged that Simon & Schuster provided the Times with information to the effect that Legion had sold more than enough copies to merit inclusion, but that the Times nevertheless refused to include the book.

Although they bear different labels, the four causes of action each have as their gravamen the alleged injurious falsehood of a statement-viz., the Times falsely represented that the list was based on actual sales; by failing to include Legion, the Times falsely represented that the novel did not meet its stated criteria for inclusion; by these misrepresentations, the Times adversely affected the volume of sales of the hardback edition and consequently the value of the paperback and film rights, thereby subjecting Blatty to injury.

Before the Times responded to the

complaint, Blatty filed a notice to take certain depositions and produce certain documents. Thereupon the Times generally demurred on the following ground, among others: "The Complaint as a whole fails to state facts sufficient to constitute a cause of action against the Times in that . . . the complained of 'Best Seller' list is not of and concerning plaintiff and therefore cannot constitutionally provide a basis for liability upon a media defendant . . ." In its memorandum of points and authorities the Times properly requested that the court take compulsory judicial notice, pursuant to Evidence Code sectiosn 452 and 453, of a copy of one week's list which bore the following legend: "The listings above are based on computer-processed sales figures from about 2,000 bookstores in every region of

the United States."

Blatty moved to compel discovery, asserting his right to do so despite the pendency of the demurrer. In support he submitted a declaration incorporating by reference an attached newspaper article which he alleged showed the relevance of the proposed discovery. Led by the article to question the truth of Blatty's allegation that the Times refused to include Legion on the list despite its receipt of sales information from Simon & Schuster, the court declined to rule on the demurrer until it could determine whether the allegation was supported by admissible evidence. Over Blatty's objection, the court then issued an order directing the parties to depose certain employees of Simon & Schuster and the Times with regard to the alleged communication and to that matter alone, and the parties did so. Also over Blatty's

objection, the court prohibited further discovery until the legal sufficiency of his complaint appeared.

Taking judicial notice of what it considered to be the "uncontradicted facts adduced at the depositions" to the effect that "at no time did [Simon & Schuster] disclose to [the Times] the actual figures of sales of the book," the court made the following ruling, as subsequently clarified, on the demurrer. As to the intentional-interference claim, the court sustained the demurrer but granted leave to amend "to allege in good fiath facts to establish (1) that the New York Times violated its public duty or trust to sell or distribute its newspaper to the public containing a fair and honest report of all news without bias or prejudice; and (2) . . . that the New York Times had in its possession reports of the actual sales

of the book, Legion, which would qualify it for inclusion on the Best Seller List, and deliberately refrained from listing plaintiff's book." As to this cause of action the court ruled that "if the new facts to be alleged also are sufficient to support other causes of action, the complaint may so allege," and that Blatty was "limit[ed] . . . to a cause of action for an intentional omission of Legion from the 'Best Seller List' by the New York Times despite its knowledge that the sales of the book to the public qualified it for inclusion on the List." As to Blatty's other claims, the court sustained the demurrer "on all grounds stated therein without leave to amend."

In his amended complaint Blatty added Doe defendants and asserted five causes of action: intentional interference with prospective economic advantage based

on the Times publication of the list in the newspaper; intentional interference with prospective economic advantage based on the Times marketing of the list separate and apart from its newspapers publication; unfair competition in violation of Business and Professions Code sections 17200 to 17208; false and misleading advertising in violation of Business and Professions Code sections 17500 to 17520; and "breach of [the] public duty and trust to report the news fairly and honestly without bias or prejudice."

The allegations underlying each of these causes of action are essentially those stated in the original complaint with the following relevant modifications and additions: the Times falsely "represented . . . that the List was an objective, unbiased and accurate compilation of actual sales of books each week by

2000 bookstores in every region of the United States"; and Simon & Schuster told the Times that it had sales figures to substantiate its claim that Legion merited inclusion, but the Times failed and refused to review the figures.

Once again, although they bear different lables the five causes of action each have as their gravamen the alleged injurious falsehood of a statement--viz., the Times falsely represented that the list was an accurate compilation of actual book sales; by failing to include Legion, the Times falsely represented that the novel did not meet its stated criteria for inclusion; and by so doing the Times caused Blatty to be harmed.

The Times again generally demurred on the ground, among others, that the complaint was 'barred by the First Amendment to the United States Constitution

and by Article I, Section 2 of the California Constitution, in that those provisions . . . forbid the imposition of liability where, as here, no statement has been made 'of and concerning' the plaintiff. . . ." In its memorandum of points and authorities the Times again effectively made a proper request that the court take compulsory judicial notice of a copy of one week's list and the legend it bore.

The court sustained the demurrer without leave to amend "on grounds stated in the moving papers," ordered the action dimissed, awarded costs to the Times, and entered judgment accordingly. After judgment Blatty moved to tax costs, and the court denied the motion.

Thereupon Blatty filed timely notices of appeal from the judgment of dismissal and the order denying his motion to tax

costs. On his motion the Court of Appeal ordered the appeals consolidated.

On appeal, Blatty contended that both the original and the amended complaints stated causes of action, and that in the proceedings on the demurrer to the original complaint the court erred in ordering and taking judicial notice of the depositions and in restricting discovery to those limited depositions. He also contended that the court erred in denying his motion to tax costs.

Relying on our decision in Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 209, in which we held that "Although ordinarily an appellate court will not consider the allegations of a superseded complaint [citation], that rule does not apply when the trial court denied plaintiffs leave to amend to include those allegations in

an amended complaint," the Court of Appeal concluded that its review extended not only to the claims of the amended complaint but also to those of the original complaint as to which the trial court sustained the demurrer without leave to amend.

The Court of Appeal held that the facts alleged were legally sufficient to support the intentional interference causes of action of the amended complaint and accordingly reversed the judgment of dismissal in that respect with directions to overrule the demurrer as to those causes of action. It also held that the trial court otherwise properly ruled on the demurrers, and hense that it was not obligated to, and did not, reach Blatty's contentions concerning the discovery rulings; it therefore affirmed the judgment in all other respects. It also dismissed the appeal from the order

denying Blatty's motion to tax costs on the ground that because the award of costs to the Times was incident to the judgment, the partial reversal operated to vacate the award and hence this appeal was moot.

Both parties petitioned for review. In his petition Blatty contended that the trial court erred in ordering and taking judicial notice of the depositions for the purpose of ruling on the original complaint and that the Court of Appeal erred in holding that no cause of action was or could be stated for negligence, negligent interference with prospective economic advantage, or unfair competition. In its petition the Times contended that the Court of Appeal erred in holding that on the facts alleged it can be held liable under either or both of the amended complaint's two causes of action for intentional interference with prospective

economic advantage.

II

When, as in this case, the ultimate object of our review is the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. We accept as true "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (Serrano v. Priest (1971) 5 Cal.3d 584, 591.) We also consider facts that may be judicially noticed. (Ibid.) Indeed, when the allegations of the complaint contradict or are inconsistent with such facts, we accept the latter and reject the former. (See, e.g. Curran v. Mount Diable Council of the Boy Scouts (1983) 147 Cal.App.3d 712, 722; Saltares v. Kristovich (1970) 6 Cal.App.3d 504, 510-511, and cases cited.) "When a demurrer is sustained, we detemined whether the complaint states facts sufficient to

constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

The Times contends that Blatty's intentional interference claims--and his other claims as well--do not, and cannot, state a claim on which relief may be granted. In support it argues, inter alia, that the First Amendment to the United States Constitution and article I, section 2, of the California Constitution establish an absolute bar to liability.

For the reasons that follow, we agree.

A

In order to advance society's interest in free and open discussion on matters of public concern and to avoid undue self-censorship by the press, the First Amendment establishes a broad zone of protection within which the press may publish without fear of incurring liability on the basis of injurious falsehood. (Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 265; see Bose Corp. v. Consumers Union of U.S., Inc (1984) 466 U.S. 485, 513; see generally New York Times Co. v. Sullivan (1964) 376 U.S. 254, 267-283; Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 155 [plur. opn.], 162-165 [conc. opn. of Burger, C.J.], 170 [conc. opn. of Black, J.], 172 [conc. opn. of Brennan, J.]; Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 339-348.) Article I, section

2, of the California Constitution, our state constitution guarantee of freedom of expression and of the press, independently establishes a zone of protection that is broader still. (See People v. Glaze (1980) 27 Cal.3d 841, 844, fn. 2; Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 908-910, affd. (1980) 447 U.S. 74; Wilson v. Superior Court (1975) 13 Cal.3d 652, 658.)

The necessity for this protection is clear. "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole." (Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at pp. 503-504.)

The First Amendment establishes its broad zone of protection by means of

various rules. Two are especially implicated by the allegations of the original and amended complaints herein.

At the threshold, in defamation actions--in which, of course, the alleged injurious falsehood of a statement is the gravamen of the plaintiff's claim--the amendment has abrogated the common law of strict liability. (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 347.) For constitutional purposes it is not enough that the traditional affirmative defense of truth, with the burden of proof on the defendant, be available to the press; rather it is the plaintiff who is required to plead and prove falsehood. (Id. at pp. 339-348; New York Times Co. v. Sullivan, supra, 376 U.S. at pp. 278-280; see, e.g. Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at p. 511, fn. 30 [holding that when the plaintiff is a

public official or public figure, in order to carry his burden he must prove "actual malice"--i.e., he must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement"; Gertz v. Rober Welch, Inc., supra, at p. 347 [effectively holding that when the plaintiff is a private individual, he must prove that the defendant made the falsehood with at least negligence].)

In defamation actions the First Amendment also requires that the statement on which the claim is based must specifically refer to, or be "of and concerning," the plaintiff in some way. The New York Times case suggested as must, although it could possibly have been read to imply that the requiement derives from the due process clause of the Fourteenth Amendment and

ultimately from the state's definition of the tort of defamation, and hence that it is merely an element which the state is presumably free to require or not as it sees fit. (376 U.S. at pp. 288-292.) Rosenblatt v. Baer (1966) 383 U.S. 75, however, made it plain that the requirement derives directly and ultimately form the First Amendment. In that case, the United States Supreme Court held that a defamation plaintiff could not constitutionally establish liability without satisfying the requirement even though the governing state law imposed no such prerequisite: "under New York Times . . . [the plaintiff is] required to show specific reference." (Id. at p. 83, italics added.)

Although the limitations that define the First Amendment's zone of protection for the press were established in defamation

actions, they are not peculiar to such actions but apply to all claims whose gravament is the alleged injurious falsehood of a statement: "That constitutional protection does not depend on the label given the stated cause of action" (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 265), and no cause of action "can claim . . . talismanic immunity from constitutional limitations" (New York Times Co. v. Sullivan, sura, 376 U.S. at p. 269). (See, e.g. Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at pp. 493-514 [in a product-disparagement action a public figure plaintiff must prove actual malice]; Time, Inc. v. Hill (1967) 385 U.S. 374, 387-388 [under a statute granting a person a right of action when his name, picture or portrait is the subject of a false publication, a public-figure plaintiff must prove

actual malice]; Reader's Digest Assn. v. Superior Court, sura, at p. 265 [in an action for intentional infliction of emotional distress, "false light" invasion of privacy, and "intrusion" invasion of privacy, a public-figure plaintiff must prove actual malice]; Kapellas v. Kofman (1969) 1 Cal.3d 20, 35, fn. 16 [same as to "false light" invasion of privacy].)

Further, it is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property broadly defined. (See Bose Corp. v. Consumers U. of U.S., Inc. (D. Mass. 1981) 508 F.Supp. 1249, 1270-1271, revd. on other grounds (1st Cir. 1982) 692 F.2d 189, affd. (1984) 466 U.S. 485 [holding that when a public-figure plaintiff sues to recover damages predicated on injury to his product, just as when he sues to recover damages

predicated on injury to his reputation, he must prove actual malice]; Simmons Ford, Inc. v. Consumers Union of U.S., Inc. (S.D.N.Y. 1981) 516 F.Supp. 742, 744, fn. 4 [same].)

The fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not solely to those labeled "defamation" is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values. (See Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 265.)

For example, the fault requirement give "freedom[] of expression . . . the 'breathing space' that [it] 'need[s] . . . to survive.'" (New York Times v. Sullivan,

surpa, 376 U.S. at pp. 271-272.) As the United States Supreme Court has stated: "Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in New York Times, Butts, Gertz, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." (Herbert v. Lando (1979) 441 U.S. 153, 171-172; accord, Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at p. 513.)

The "of and concerning" or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt.

To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society. For example, as a federal court has cautioned, the absence of the "of and concerning" requirement "could invite any number of vexatious lawsuits and seriously interfere with public discussion of issues, or groups, which are in the public eye. Statements about a religious, ethnic, or political group could invite thousands of lawsuits from disgruntled members of these groups claiming that the portrayal was inaccurate and thus libelous. Such suits would be especially damaging to the media, and could result in the public receiving less information about topics of general concern." (Michigan United Conservation Clubs v. CBS News (W.D.Mich. 1980) 485 F.Supp. 893, 900, affd. (6th

Cir. 1981) 665 F.2d 110.) In the special case in which the plaitniff is a public official suing in response to criticism of governmental operations, an absence of this requirement would allow recovery based on a theory that is "tantamount to . . . libel of government, and therefore . . . constitutionally insufficient." (Rosenblatt v. Baer, supra, 383 U.S. at p. 83.)

The "of and concerning" requirement serves to immunize a kind of statement which, though it can cause hurt to an individual, is deemed too important to the vigor and openness of public discourse in a free society to be discouraged. Statements of opinion, "[h]owever pernicious," are immunized by the First Amendment in order to insure that their "correction [depends] not on the conscience of judges and juries but on the competition of other ideas." (Gertz v.

Robert Welch, Inc., supra, 418 U.S. at p. 339.) Statements without specific reference are immunized for a similar reason: "'It is far better for the public welfare that some occasional consequential injury to an individual arising from general censure of his profession, his party, or his sect should go without remedy than that free discussion on the great questions of politics, or morals, or faith should be checked by the dread of embittered and boundless litigation.'" (Michigan United Conservation Clubs v. CBS Nes, supra, 485 F.Supp. at . 900.)1/

1/ To be referred to specifically, we emphasize, the plaintiff need not be mentioned by name, but may be identified by clear implication. For example, if a company consists of Smith, Jones, and Doe, and publication asserts "Smith and Jones are the only honest members of the company," certainly the publication specifically refers to Doe and accuses him of dishonesty by clear implication.

Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated "defamation," they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than "defamation" to their injurious-falsehood claims--a task that appears easy to accomplish as a general matter (see, e.g., Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 265 [injurious-falsehood claim asserted as causes of action for defamation, intentional infliction of emotional distress, "false light" invasion of privacy, and

"intrusion" invasion of privacy])--and thereby avoid the operation of the limitations and frustrate their underlying purpose.

Regrettably, the foregoing is not mere unsupported speculation. In recent years plaintiffs suing press defendants have more frequently affixed lables other than defamation to injurious falsehood claims and have increasingly achieved some measure of success in their actions. (Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution (1983) 23 Wash.L.J. 24, 24-25, 30-44 [discussing defamation, privacy, and intentional infliction of emotional distress theories].)

It follows that to prevent creative pleading from rendering the limitations nugatory, they must be broadly applicable whenever the gravamen of the claim is injurious falsehood.

B

The causes of action for intentional interference with prospective economic advantage, as stated, are barred by the First Amendment.

It is plain that Blatty's intentional interference claims have as their gravamen the alleged injurious falsehood of a statement. Under the allegations of the amended complaint the assertion they make is as follows: the Times falsely represented that the list was an accurate compilation of actual book sales, by failing to include Legion, the Times falsely represented that the novel did not meet its stated criteria for inclusion; by so doing the Times caused Blatty to be harmed. Under the allegations of the original complaint the assertion can be read in substantially the same way, and in his petition for review Blatty himself urged us to do so. Because these

causes of action thus have as their gravamen the alleged injurious falsehood of a statement, they must satisfy the requirement of the First Amendment.

It is also plain that Blatty's intentional interference claims fail to satisfy First Amendment requirements.

The claims fail to allege that the list is of and concerning, or specifically refers to, Blatty or his novel. In order to satisfy this requirement, the plaintiff must effectively plead that the statement at issue either expressly metions him or refers to him by reasonable implication. (Cf. Kelly v. Johnson Publishing Co. (1958) 160 Cal.App.2d 718, 721-726 [action for defamation and invasion of privacy]; Saucer v. Giroux (1921) 54 Cal.App. 732, 733-734 [action for defamation].) Blatty, however, can do neither.

To begin with, the list does not

expressly refer to Blatty or his novel. Nor does he contend otherwise. Quite the contrary: the failure of Legion to appear on the list is the very basis of his action.

Further, the list cannot be reasonably understood to refer to Blatty or his novel by implication. When, as in this case, the statement that is alleged to be injuriously false concerns a group--here, books currently in print and their authors--the plaintiff faces a "difficult and sometimes insurmountable task. If the group is small and its members easily ascertainable, [the] plaintiff[] may succeed. But where the group is large--in general, any group numbering over twenty-five members--the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them,' See, e.g., Noral v. Hearst Publications, Inc., 40 Cal.App.2d 348 350, 104 P.2d 860 (1940);

Mullins v. Brando, 13 Cal.App.3d 409, 422-23 & n. 13, 91 Cal.Rptr. 796 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2231, 29 L.Ed.2d 701 (1971), and cases cited therein; Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952)." (Barger v. Playboy Enterprises, Inc. (N.D. Cal. 1983) 564 F.Supp. 1151, 1153, affd. (9th Cir. 1984) 732 F.2d 163, cert. den. ____ U.S. ____ [105 S.Ct. 175] [discussing Cal. defamation law].)

The group in question here obviously numbers substantially more than 25 members: a visit to even the smallest bookstore establishes this fact. Moreover, Blatty himself has impliedly admitted the point. In the amended complaint he alleges that "To obtain sales figures from bookstores, [the Times] sent to the bookstores forms . . . which [it] prepared; the forms for works of fiction contain and contained a printed list of 36 'bestselling' books

which has and had the effect of encouraging reports as to sales of books listed on the forms and discouraging reports as to sales of books not listed on the forms. . . . " By so stating Blatty impliedly alleges that the "forms" should have contained the titles of more than 36 books and hence books were potentially among the tope 15 "best sellers".2/

2/ Blatty's claims also fail to effectively allege falsehood. Contrary to Blatty's allegation, the Times did not make the crucial false representation of which he complains--viz., that the list was an accurate compilation of actual book sales. This is so because the Times never made such a representation, whether true or false. The legend of the list--of which the trial court properly took compulsory judicial notice (Evid. Code, §§452, subd. (h), and 453), and of which we must therefore take judicial notice as well (id., §459, subd. (a))--declared merely that "The listings above are based on computer-processed sales figures from about 2,000 bookstores in every region of the United States." To the extent that Blatty may mean to argue that the compound adjective "computer-processed" implies, in the words of the amended complaint, an "objective,

(fn. cont.)

Not only are the intentional interference claims barred by the First Amendment as stated, Blatty has failed to attempt to carry his burden of showing that it is reasonably possible he can cure the defect by amendment. Limiting our consideration to the "of and concerning" requirement, we reiterate that in sustaining the demurrer to the amended complaint without leave to amend the trial court relied generally "on ground stated in the moving papers"--one of which was that the complaint was barred by the constitutional provisions forbidding the imposition of liability "where, as here, no statement has been made 'of and concerning' the plaintiff. . . . " Even though he was

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(fn. 2 cont.)

unbiased and accurate compilation of actual sales," he is unpersuasive: the legend plainly implies that the list represents a general ranking of books based on sales figures from a sample of bookstores.

thus put on notice, Blatty has made no attempt to carry his burden. Hence, we are compelled to conclude that there is no reasonable possibility he can cure the defect.

To prevent this conclusion Blatty insists that the "of and concerning" requirement does not derive from the First Amendment. The point, as we have shown, is plainly without merit.

Blatty then argues in effect that to require a plaintiff to establish that the alleged injurious falsehood published by a press defendant is "of and concerning" him would add a new element to the tort of intentional interference with prospective economic advantage and thereby alter its nature, and that such a result is impermissible. In support he relies on Falwell v. Flynt (4th Cir. 1986) 797 F.2d 1270, in which the court held that a public-figure

plaintiff suing a press defendant for intentional infliction of emotional distress was not required to establish actual malice as that term has commonly been understood: "When applied to a defamation action, the actual malice standard alters none of the elements of the tort; it merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication. Requiring a plaintiff to prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature." (Id. at p. 1275.) The point must be rejected.

The fundamental premise of Blatty's argument is unsound. Under the supremacy clause of state's definition of a tort cannot undermine the requirements of the First Amendment. That is precisely the

teaching of New York Times. In that case, the United States Supreme Court held that the First Amendment required the plaintiff to establish falsity (376 U.S. at pp. 279-280)--even though state law did not require him to do so (id. at p. 262). Indeed, in that case the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The Falwell court misses this crucial point and as a result cannot be followed.3/

3/ Blatty argues in effect that the First Amendment is inapplicable to the intentional-interference claim based on the Times's marketing of the list, on the ground that in that context the list constitutes "commercial speech." The argument is unpersuasive. To begin with, even in that context the list does not constitute commercial speech. "Commercial speech" is defined as speech that does "no more than propose a commercial transaction. . .·." (Pittsburg Press Co. v. Human Rel.

(fn. cont.)

Because each of the other causes of action that Blatty attempted to assert in

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(fn. 3 cont.)

Comm'n (1973) 413 U.S. 376, 385; see Friedman v. Rogers (1979 440 U.S. 1. 10. fn. 9: see generally Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal.3d 501, 510-511.) The list plainly does not come within that definition. That the Times is alleged to have marketed the list for its newspaper profit does not affect the result: commercial motivation does not transform noncommercial speech into commerical speech (see Friedman v. Rogers, supra, at p. 11, fn. 10; see also Va. Pharmacy Bd. v. Va Consumer Council (1976) 425 U.S. 748, 761 [stating that "Speech . . . is protected [under the' First Amendment] even though it is carried in a form that is 'sold' for profit"]; New York Times Co. v. Sullivan, supra, 376 U.S. at p. 266 [holding that the fact that the Times was paid for publishing the noncommercial advertisement in question in that case was "immaterial"]).

In any event, Blatty's major premise is false: commercial speech is not excluded from First Amendment protections. (E.g., Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at p. 504. fn. 22: Schaumburg v. Citizens for Better Environ. (1980) 444 U.s. 620, 632, fn. 7; Va. Pharmacy Bd. v. Va. Consumer Council, supra, 425 U.S. at pp. 758, 770.)

his original and amended complaints has as its gravamen the alleged injurious falsehood of the list and hence must satisfy First Amendment requirements, and because none of them does or can reasonably allege that the list is "of and concerning" Blatty or his novel, the Court of Appeal did not err in holding that the judgment of dismissal was proper as to them. Thus, we need not discuss Blatty's argument to the contrary. Nor need we consider his contentions going to the trial court's discovery rulings and its taking of judicial notice of the depositions in passing of the Times demurrer to the original complaint. Since each of the causes of action, as we have concluded, was barred on First Amendment grounds specified in the demurrer, the sustaining of the demurrer was correct and as such must be upheld. (Penziner v. West American Finance Co. (1933) 133 Cal.App. 578, 582;

Des Granges v. Crall (1915) 27 Cal.App. 313, 316; see e.g. Weinstock v. Eissler (1964) 224 Cal.App.2d 212, 224-226.) It follows that Blatty's point is uncessary to our decision and need not be considered. (E.g., Ferguson v. Keays (1971) 4 Cal.3d 649, 656, fn. 6; Young v. Three for One Oil Royalties (1934) 1 Cal.2d 639, 647.)4/

The judgment of the Court of Appeal is reversed in so far as it reverses the judgment of dismissal on the amended complaint's causes of action for intentional interference with prospective economic advantage, with directions to affirm the judgmeent in that respect,

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4/ Throughout this opinion we have used "First Amendment" to refer not only to that provisions of the United States Constituion, but also to article I, section 2, of the California Constitution. It is the later on which we preimarily rely.

and in all other respects the judgment of the Court of Appeal is affirmed; and the order of the Court of Appeal dismissing as moot the appeal from the order denying the motion to tax costs is reversed with directions to resolve that issue on the merits.

Mosk, J.

WE CONCUR:

Bird, C.J.
Reynoso, J.
Panelli, J.

C O P Y

BLATTY v. NEW YORK TIMES COMPANY

L.A. 32173

CONCURRING AND DISSENTING OPINION

BY GRODIN, J.

I cannot join in the majority's conclusion that the "of and concerning" requirement applicable to defamation actions is a constitutionally-required element of a cause of action for intentional interference with prospective economic advantage, whenever the alleged intentional tort is effectuated through a media publication. A hypothetical example may be helpful in exposing

the fallacy of the majority's broad holding.

Suppose that the New York Times, after conducting its normal survey of representative bookstores throughout the country, found that Blatty's novel was, indeed, the top selling book for a particular week based on its own statistics. Suppose further that, despite this information, the Times purposefully substituted one of its own publications for Blatty's book at the top of its best seller list in order to enhance its own book's sales, and entirely omitted Blatty's book from the list.

Under the majority's analysis, Blatty would have no cause of action against the New York Times for intentional interference with prospective economic advantage under these hypothetical facts,

because nothing in the false best seller list would have indicated to the reading public that the falsity in the published information was "of and concerning" Blatty's book. It seems clear from this hypothetical, however, that the "of and concerning" requirement is ill-suited to this type of intentional tort, since the plaintiff is required in any event to prove, as an element of the tort, that the defendant acted for the specific purpose of injuring the particular plaintiff. If a plaintiff can prove that a media defendant knowingly published a false statement for the purpose of inflicting financial injury on him persoanlly, I do not believe that the free speech provisions of either the state or federal Constitution would be offended if the defendant were held liable in damages for such conduct, even if it

were not obvious on the face of the publication who the defendant was intending to injure. Thus, I do not join in the majority's broad holding.

Nonetheless, on the specific facts of this case, I concur in the judgment. Although, plaintiff has attempted to state a cause of action for intentional interference with prospective economic advantage, the facts that he had alleged -- even after being granted leave to amend -- are not, in my view sufficient to support such an action. Plaintiff's allegations do not suggest that the Times intentionally misrepresented the actual results of its bookstore survey for the purpose of injuring plaintiff financially; at most, the allegations suggest that the Times did not do as thorough a job in gathering sales statistics as it should have and that,

after Blatty's publisher complained to the Times, the Times should have realized that its survey figures would harm plaintiff financially. Even assuming those allegations are true, they would not support recovery on an intentional interference theory.

Accordingly, I agree with the majority that the trial court properly sustained defendants' demurrer to all causes of action, and I concur in the reversal of the judgment of the Court of Appeal to the extent that its judgment is inconsistent with this conclusion.

GRODIN, J.

WE CONCUR:

BROUSSARD, J.
LUCAS, J.

Supreme Court
F I L E D
Feb. 26, 1987
Laurence P. Gill, Clerk

ORDER DUE
February 27, 1987

ORDER DENYING REHEARING

LA No. 32173

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

BLATTY,

Appellant

v.

NEW YORK TIMES CO.,

Respondent

Appellant's petition for rehearing DENIED.

The request for an order directing partial publication of the Court of Appeal opinion in the above-entitled cause is DENIED.

"Lucas"
Chief Justice